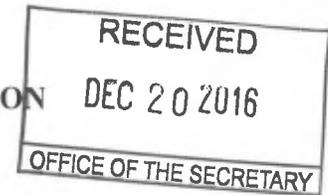


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-17342

In the Matter of

RD LEGAL CAPITAL, LLC and
RONI DERSOVITZ

**RESPONDENTS' MOTION TO
QUASH OR, IN THE
ALTERNATIVE, TO MODIFY
SUBPOENA**

RD Legal Capital, LLC and Roni Dersovitz ("Respondents") respectfully request that the Court set aside or modify the subpoena issued on December 8, 2016, and served on Respondents on December 14, 2016, in order to (1) cover only documents relating to the specific issues as to which Respondents anticipate asserting a reasonable and good faith reliance on the advice of professionals in response to the allegations made by the Division of Enforcement ("the Division") in its Order Instituting Administrative Cease-and-Desist Proceedings ("OIP"); and (2) extend the return date by which Respondents must complete this production by three weeks, to January 13, 2017.

INTRODUCTION

In an order dated November 23, the Court noted that it was "unusual" for the Division to request the issuance of subpoenas *duces tecum* after an investigation has been completed. Order at 1 (Nov. 23, 2016). Yet the Division again seeks, in a subpoena issued on December 8 and served upon Respondents on December 14 (the "Subpoena"), an extraordinarily broad scope of documents relating to the professional services, advice, and counsel provided to Respondents by

a large number of attorneys, accountants, auditors, and other professionals over a long period of time. This most recent request varies little from the one the Court already denied as “unreasonable and excessive in scope.” *Id.* at 1-2. Furthermore, the Division set the return date for this Subpoena as December 19, 2016, an untenably short period of time to produce the volume of documents contemplated by the Division. Subpoena at 1 (Tab A).

In an effort to ameliorate the burden placed upon Respondents by the breadth of the Division’s Subpoena, Respondents respectfully ask that the Court modify the Subpoena to limit it, by subject matter, to what the Division claims it is entitled to: namely, documents that relate to *only those issues* as to which, in response to the Division’s allegations, Respondents anticipate asserting a good faith reliance on the advice of professionals. Moreover, the Respondents ask that the return date by which the production of documents must be completed be extended from December 19 – less than a week after service – to January 13, 2017. The Division should not be entitled to draw the boundaries of its Subpoena so broadly that they may barely be seen in the distance, nor to set a deadline so close that it offers no time to comply.

BACKGROUND

The Division’s current request follows others where it has sought to delve into Respondents’ privileged communications with legal counsel, writ large, over a period of many years. After denying the Division’s most recent request for a subpoena seeking virtually all of Respondents’ communications with legal counsel, the Court directed Respondents to provide the Division with a narrative of the subject areas where Respondents relied on the advice of counsel and other professionals that may relate to the issues in the OIP. Order at 2 (Nov. 23, 2016). Respondents provided such a narrative, identifying the fifteen separate law firms and seven other professional firms that provided advice to the Respondents that may relate to the broad

allegations in the OIP. *See* T. Healy Ltr. to M. Birnbaum (Dec. 5, 2016) (Tab A). As shown in this narrative, Respondents relied on the professional expertise of legal counsel, valuation agents, accountants, auditors, and other professionals in virtually all aspects of their business.

On December 7, 2016, the Division requested the issuance of a subpoena directing Respondents to produce “[a]ll documents relating to RD Legal Capital, LLC’s and Roni Dersovitz’s ‘reliance defense’ as set forth by Respondents in the attached ‘Submission Related to Respondents’ Reliance on Counsel,’” by 10:00 a.m. on December 19, 2016. *See* Division’s Request for Issuance of Subpoena to Produce Documents (Dec.7, 2016). The Court signed this Subpoena on December 8, 2016, and returned it to the Division. The Division served the Subpoena upon Respondents on December 14, 2016, nearly a week after its issuance.

DISCUSSION

I. THE SUBPOENA SHOULD BE SET ASIDE AS SEEKING IMPROPER DISCOVERY

The primary purpose of the Subpoena appears to be to force Respondents to identify documents on which they may rely in connection with the presentation of any defenses based on reliance on professional advice. Interrogatories, however, are not permitted under the amended Rules of Practice, and the Court should not permit the Division to use the subpoena process as an end-run around the limits on discovery it is entitled to receive in an administrative proceeding.

The Division is not entitled to issue discovery requests that are so broad that they effectively function as interrogatories. The Division is entitled only to the limited discovery allowed under the amended Rules of Practice, which do not in any way require Respondents to review the entirety of the documents produced to date—nearly a million pages—to identify every single document that bears in any way on Respondents’ reliance on the advice of professionals with respect to issues related to the allegations in the OIP. It is one thing to order

the production of documents directly related to Respondents' anticipated assertion of good faith reliance as to certain discrete issues, in a limited time frame and among limited sets of entities; it is another thing to place a burden on Respondents to sift through the past productions and identify all documents that could possibly be brought to bear on a reliance assertion, at risk of waiver. The Division cannot have its cake and eat it too. If it wanted to propound interrogatories, it should have filed this case in federal court. It cannot, however, avail itself of the advantages of bringing this action as an administrative proceeding while circumventing the limits on discovery applicable to such proceedings.

The Subpoena should be set aside because it is overbroad and unduly burdensome, and because it seeks discovery to which the Division is not entitled in the context of an administrative proceeding. The Rules of Practice do not permit the Division to propound interrogatories, yet the Subpoena essentially requires Respondents to identify all documents on which it may rely in connection with any defenses based on reliance on professional advice. This places Respondents in a completely untenable position whereby they must wade through the millions of pages of documents they previously produced to identify each and every document that may be relevant to a reliance defense, presumably at the risk of waiving the right to rely on any documents that they do not so identify. This unfairness is compounded by the fact that Respondents had no opportunity to object to and be heard on the Subpoena before it was issued, and that the Subpoena had a return date that gave Respondents only five calendar days to respond.

II. THE SUBPOENA SHOULD ONLY COVER DOCUMENTS RELATED TO ISSUES UPON WHICH RESPONDENTS MAY ASSERT GOOD FAITH RELIANCE

Alternatively, the terms of the Subpoena should be modified to address its unreasonable breadth. The Commission has long recognized that a respondent's good faith reliance on the

advice of legal counsel and other professionals, in areas of their professional expertise, can mitigate against a finding of a requisite mental state to support a charge of fraud. *See Howard v. SEC*, 376 F.3d 1136, 1148 (D.C. Cir. 2004) (“[R]eliance on the advice of counsel need not be a formal defense; it is simply evidence of good faith, a relevant consideration in evaluating a defendant’s scienter.”). In some circumstances, a reliance on professionals can even be a complete defense to a claim. *See Herbert Moskowitz*, Opinion of the Commission, Admin. Proc. File No. 3-9435, 2002 WL 434524, at *9 n.61 (Mar. 21, 2002) (describing elements of reliance on counsel defense). In its adopting release accompanying the amended Rules of Practice, the Commission noted that “the issue of reliance on professional advice” may be “an assertion of a formal affirmative defense,” but may also be “an argument in response to the claims alleged in the OIP on which the Division retains the burden of proof.” Amendments to the Commission’s Rules of Practice (“Adopting Release”), 81 Fed. Reg. 50212, 50220 (July 29, 2016). Thus, while reliance on counsel or professionals may at times be an affirmative defense, evidence of reliance also can be presented at a hearing to show conformance with a course of conduct that weighs against a finding of liability on a claim where the Division still maintains the burden of proving its charge.

Here, Respondents have stated in their answer, as required by the amended Rules, that they intend to raise the issue of good faith reliance on professional advice in the proceeding, at least with respect to certain of the allegations made in the OIP. The OIP, however, often states its allegations broadly, and it is not always clear—on this date, at the outset of fact discovery—which allegations merit the assertion of reliance on counsel as an affirmative defense, in which the burden of proof is shifted to Respondents, and which allegations may be rebutted simply by raising reliance on professionals as “evidence of good faith,” for which the Division retains its

burden. *Howard*, 376 F.3d at 1148; *see also* Adopting Release, 81 Fed. Reg. at 50220. By drawing the terms of its subpoena on the reliance issue as broadly as possible, the Division effectively seeks to shift to Respondents the burden of determining now, without knowing the specific alleged misstatements or fact patterns the Division will seek to present at trial, how best to contest the OIP's ambiguous allegations. It should not be permitted to do so.

Respondents understand that, as to any issue for which they intend to assert good faith reliance on the advice of professionals at the hearing, the Division is entitled to disclosure of all communications regarding that issue. Respondents have no intention of asserting good faith reliance with respect to any issue for which they have not fully discharged their disclosure obligations under the Subpoena and the Rules of Practice. Indeed, Respondents have already produced, in response to the Division's requests, a great number of documents—some of which were otherwise privileged—relating to issues on which Respondents intend to assert good faith reliance at the hearing.¹ To the extent that Respondents discover additional, unproduced

¹ It is important to keep in mind that throughout the Division's investigation and this proceeding, Respondents have undertaken to provide nearly a million pages of documents throughout dozens of separate productions. Most recently, on November 30, 2016, Respondents produced 867 documents to the Division. The production consisted of materials that had previously been identified by Respondents on a privilege log related to Pluris (13 documents), Reed Smith (762 documents), and Smith Mazure (92 documents). As background, the Staff issued a subpoena to Respondents on February 29, 2016 broadly requesting, *inter alia*, "all documents and communications, within RD Legal, with any RD Legal valuation committee, with any valuation agent, or with any third parties, including actual or potential investors, regarding the Peterson claims, from January 1, 2009 through the present." In responding to this subpoena, Respondents identified over 160,000 potentially responsive documents. Because the time and cost of reviewing those documents would have been excessive, it was agreed in a telephone call between Respondents' counsel and the Staff that the Staff would accept a production of all 160,000 documents without Respondents having conducted a review for responsiveness. Respondents therefore in the first instance only reviewed the data set to carve out privileged communications with counsel, and included these withheld documents on a privilege log.

documents that bear on an issue as to which Respondents anticipate asserting good faith reliance, those documents, if any, will be produced.

In summary, Respondents have already largely complied with the boundaries of the Division's Subpoena, as those boundaries are interpreted reasonably and in good faith. Should Respondents' review of documents in response to this subpoena reveal additional communications or work product, whether or not otherwise privileged, bearing on an issue that (1) is related to the allegations in the OIP and (2) is one in which Respondents reasonably and in good faith relied on the advice of professionals in a manner pertinent to these proceedings, then Respondents will produce those communications or work product. That is, Respondents have produced, or will produce, all materials that have relevance to any reliance defense that Respondents anticipate asserting in response to the allegations of the OIP. And Respondents will produce any additional communications or work product bearing on the specific issues as to which Respondents anticipate raising a defense of reasonable reliance on the judgment, advice, and counsel of professionals.

However, the law firms described in Respondents' narrative summary also provided legal services to RD Legal on a variety of issues and in a variety of areas unrelated to the allegations in the OIP. Respondents do not waive privilege over any work product or communications in those areas, or in any other areas with respect to which Respondents do not anticipate asserting a reasonable reliance on the advice of counsel.

Similarly, as described in Respondents' December 5 letter, many non-legal professionals provided professional services to RD Legal. Respondents will not produce, or waive any applicable privilege over, any additional documents related to services provided by non-legal professionals, except to the extent that those documents bear on issues as to which Respondents

anticipate asserting a good faith reliance on the advice of those professionals with respect to allegations in the OIP.

Finally, Respondents do not waive privilege over, and will not produce, any communications or work product made in the context of the present proceedings. Such communications are nonresponsive because they do not directly pertain to issues regarding which Respondents anticipate asserting good faith reliance on professionals.

Respondents thus respectfully move the Court to limit the scope of the Subpoena such that it is clear that the Subpoena does not apply to any documents *other than those* that relate to an issue as to which Respondents anticipate asserting good faith reliance on advice of counsel, whether as an affirmative defense or as a relevant consideration when evaluating scienter, in response to an allegation made in the OIP.

III. THE CURRENT RETURN DATE FOR THE SUBPOENA SHOULD BE EXTENDED

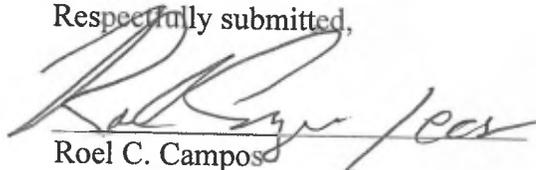
As discussed above, Respondents fully intend to produce, to the extent they have not done so already, documents relating to issues on which Respondents intend to assert good faith reliance at the hearing. The Division's return date of December 19, 2016, does not allow for sufficient time for compliance, especially in light of the fact that Respondents were served with the Subpoena on December 14, 2016—only three business days prior to the stated return date. Respondents respectfully request modification of the Subpoena to allow for a return date of January 13, 2017. The proposed return date would allow Respondents a reasonable amount of time to prepare the production and would allow for production by the close of fact discovery in this matter.

CONCLUSION

For the reasons set forth above, Respondents respectfully ask the Court to modify the Subpoena in the manner described.

Dated: December 19, 2016

Respectfully submitted,



Roel C. Campos
Terence M. Healy
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1775 I Street, N.W.
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Los Angeles, CA 90017-5524
213-629-9040
www.caldwell-leslie.com

Counsel for Roni Dersovitz

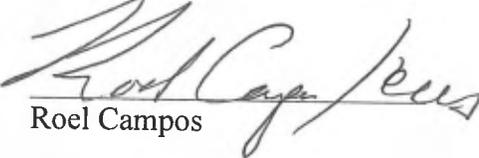
CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Motion to Modify Subpoena was served on this 9 day of December 2016 by U.S. Postal Service on the Office of the Secretary and by electronic mail and U.S. Postal Service on the following counsel of record:

Michael D. Birnbaum
Securities and Exchange Commission
New York Regional Office
Brookfield Place, 200 Vesey Street
New York, NY 10281

Jorge Tenreiro
Securities and Exchange Commission
New York Regional Office
Brookfield Place, 200 Vesey Street
New York, NY 10281

Victor Suthammanont
Securities and Exchange Commission
New York Regional Office
Brookfield Place, 200 Vesey Street
New York, NY 10281


Roel Campos

Tab A



SUBPOENA TO PRODUCE DOCUMENTS

Issued Pursuant to U.S. Securities and Exchange Commission Rules of Practice 111(b) and 232, 17 C.F.R. §§ 201.111(b), 201.232.

1. TO
RD Legal Capital, LLC

This subpoena requires you to produce documents or other tangible evidence described in Item 7, at the request of the Party described in Item 4, in the U.S. Securities and Exchange Commission Administrative Proceeding described in Item 6.

2. PLACE OF PRODUCTION
Securities and Exchange Commission
c/o Michael Birnbaum
Brookfield Place, Suite 400
200 Vesey Street, New York, NY 10281

3. DATE AND TIME PRODUCTION IS DUE
December 19, 2016 at 10:00 a.m.

4. PARTY AND COUNSEL REQUESTING
ISSUANCE OF SUBPOENA
Division of Enforcement, SEC

5. THE PRODUCTION OF DOCUMENTS OR OTHER
TANGIBLE EVIDENCE IS ORDERED BY

Administrative Law Judge
U.S. Securities and Exchange Commission

6. TITLE OF THE MATTER AND ADMINISTRATIVE PROCEEDING NUMBER

RD Legal Capital, LLC and Roni Dersovitz, File No. 3-17342

7. DOCUMENTS OR OTHER TANGIBLE EVIDENCE TO BE PRODUCED (ATTACH PAGES AS REQUIRED)

See Appendix

DATE SIGNED

Dec. 8, 2016

SIGNATURE OF ADMINISTRATIVE LAW JUDGE

Carol Cox Koehler

GENERAL INSTRUCTIONS

MOTION TO QUASH

The U.S. Securities and Exchange Commission's Rules of Practice require that any application to quash or modify a subpoena comply with Commission Rule of Practice 232(e)(1). 17 C.F.R. § 201.232(e)(1).

Appendix

All documents relating to RD Legal Capital, LLC's and Roni Dersovitz's "reliance defense" as set forth by Respondents in the attached "Submission Related to Respondents' Reliance on Counsel."

December 5, 2016

BY EMAIL AND USPS

Michael Birnbaum
U.S. Securities and Exchange Commission
New York Regional Office
Brookfield Place
200 Vesey Street, Room 400
New York, New York 10281

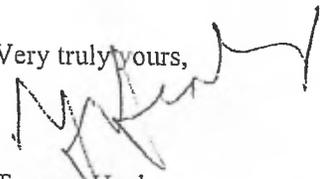
Re: *In the Matter of RD Legal Capital, LLC and Roni Dersovitz,*
SEC Administrative Proceeding File No. 3-17342

Dear Michael:

In response to the Court's order dated November 23, 2016, attached please find Respondents' statement concerning legal advice on which they relied and which may relate to the issues alleged in the OIP, and the identity of the various counsel and other professionals who provided advice to Respondents.

If you have any questions, please let me know.

Very truly yours,


Terence Healy

cc: David Willingham
Michael Roth

*In the Matter of RD Legal Capital, LLC and Roni Dersovitz
Administrative Proceeding File No. 3-17342*

Submission Related to Respondents' Reliance on Counsel

In the answer to the Order Instituting Administrative and Cease-and-Desist Proceedings ("OIP"), Respondents raised as an additional defense that they relied reasonably on the advice of legal counsel and other professionals. Specifically, Respondents stated that:

The Division's claims are barred in whole or in part because Respondents relied in good faith upon the judgment, advice, and counsel of attorneys, accountants, auditors, and other professionals, including but not limited to a nationally-recognized third-party valuation agent, as to matters reasonably believed to be within such persons' professional or expert competence.

Answer at 49. In an Order issued November 23, 2016, the Court asked Respondents to describe the legal advice on which they relied concerning the issues alleged in the OIP and to identify the attorneys, accountants, auditors, and other professionals who provided advice.

The OIP raises allegations against Respondents covering a more than five-year period from June 2011 to present. Over that time, Respondents received legal counsel from various legal professionals and firms. These included Seward and Kissel; Ogier; Reisman, Peirez, & Reisman; Reed Smith LLP; Caldwell Leslie & Proctor, PC; Cooley; Otterbourg, Steindler, Houston & Rosen; Henry Davis York; Calcagni & Kanefsky; Fischer Porter & Thomas PC; Reid & Hellyer; Stetina, Brunda, Garred & Brucker, PC; Stubbs & Perdue, P.A.; DeClemente & Associates; Hartman Simons & Wood LLP; and Greenberg Traurig, LLP.

Each of these firms advised Respondents issues which may, directly or indirectly, relate to allegations in the OIP. For example, attorneys from Reed Smith LLP provided counsel to Respondents on issues as varied as consumer lending laws; assignment and sale agreements; marketing materials; offering documents; UCC filings; the forfeiture of the real property at 650

Fifth Avenue, New York; disputes with investors; general fund advice; analysis of potential new fund investment opportunities; and negotiations with third parties for the sourcing of receivables in the *Peterson* cases. Reed Smith LLP also provided personal estate planning services to Roni Dersovitz.

As to other examples of issues that may relate to allegations raised in the OIP, Seward & Kissel drafted the offering memoranda for the funds, including risk disclosures, and advised Respondents on the application and authority granted to the fund manager under those documents; Ogier advised Respondents on issues related to the operation of the offshore fund; Henry Davis York advised Respondents on issues related to Australian law; Mourant Ozannes advised Respondents on issues related to Caymans law; and White & Case advised Respondents on issues related to Japanese law.

Respondents relied upon the professional expertise and competence of all its legal counsel in all of the areas above.

Moreover, the OIP fails to allege the conduct at issue with particularity, and Respondents accordingly reserve the right to identify their reliance on any advice that may relate to conduct or issues that have not been specifically identified in the OIP.

In addition to the legal counsel identified above, Respondents relied on the advice of various other professionals concerning areas within the professional expertise of those individuals. These included Espen Robak and other professionals from Pluris Valuation Advisors, LLC, which provided valuation services to Respondents; Dennis Schall and other professionals from Marcum LLP, which provided accounting and auditing services to Respondents, including auditing the valuation procedures used to value the assets held in the investor funds; professionals from Wiss & Company, LLP, which provided accounting and

auditing services to Respondents, including reporting on agreed-upon procedures; Woodfield Fund Administration LLC, which provided accounting, administration, and performance reporting services to Respondents; Scott Gottlieb and U.S. Compliance Consultants, which provided compliance services to Respondents, including reviewing fund documents and marketing materials provided to investors and potential investors in the funds; Amy Hirsch and Paradigm Consulting Services, LLC, which provided compliance services to Respondents, including reviewing fund documents and marketing materials provided to investors and potential investors in the funds; Corey Tavel and other professionals from Smith Mazure, PC, which provided legal case file auditing and valuation services to Respondents; and various employees of Respondents and/or entities related to Respondents, including its accountants, underwriters, and Chief Financial Officer.

Tab B

December 5, 2016

BY EMAIL AND USPS

Michael Birnbaum
U.S. Securities and Exchange Commission
New York Regional Office
Brookfield Place
200 Vesey Street, Room 400
New York, New York 10281

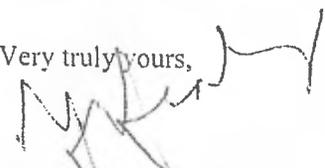
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